Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Children's Television Obligations Of Digital Television Broadcasters	)	MM Docket No. 00-167
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OPPOSITION TO PETITIONS FOR RECONSIDERATION OF THE CHILDREN'S MEDIA POLICY COALITION

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SUMMARY

The Children's Media Policy Coalition opposes efforts to rollback or water down the children's television obligations of digital television broadcasters. Both the increase in the amount of core programming needed to satisfy the processing guideline for broadcasters who choose to multicast, and the limit on the number of times core programming may be preempted and still be considered regularly scheduled, are essential to ensure that broadcasters air, and children can find, a sufficient quantity of educational and informational ("E/I") programming. The revised definition of commercial matter to include promotions of non-E/I programs and displays of addresses for commercial websites is necessary to protect children from excessive commercialism and to ensure adequate separation of commercial and program content.

The Commission should reject arguments that increasing the processing guideline for multicasting broadcasters is unnecessary. In fact, the record contains substantial evidence that the educational needs of children are not currently being met by the 3-hour guideline. At the same time, the revised guideline gives broadcasters flexibility to air the additional core programming on their main program stream or on other program streams. Any inflexibility here resides not with the Commission's regulations but with the broadcasters. The Commission has ample authority to update the children's processing guideline. Section 336(d) provides that a broadcaster's public interest obligations continue in the digital age, and Section 303b directs the Commission to ensure that broadcasters have served the educational and informational needs of children through their "overall programming." Just as the Commission's adoption of a processing guideline for children's core programming in 1996 was consistent with the First Amendment, so too is the update of that guideline to reflect the advanced capabilities of digital television.

The Commission should also reject requests to rescind the 10% limit on preemptions of programs counted toward the guideline. The Commission gave adequate notice that it was considering a limit on preemptions and seeking ways to improve public awareness of E/I programming in both the analog and digital contexts. The Commission has ample reason to be concerned about preemptions as its own study showed that, in some quarters, stations preemption levels reached 25%. Although the Coalition believes that the preemption limit affords broadcasters sufficient flexibility, we do not oppose applying the limit on an annual basis.

The Commission should reject requests to rescind its revised definition of commercial matter. The Commission possesses ample authority to revise the advertising limits by changing the definition of commercial matter to include promotions for non-E/I programming. The record shows that such promotions contribute substantially to the amount of non-program content in children's programming, thus decreasing the length of the actual programming. The Commission's decision to include promotions for non-E/I programs addresses this problem in both the short and long run. While some Petitioners complain that this decision will result in decreased revenues, they offer no evidence to support these claims. The evidence suggests that demand for advertising on children's programming is relatively inelastic and any decrease in the supply of ads will be offset by price increases. Finally, the Commission's decision is consistent with the First Amendment under the *Central Hudson* test.

The Coalition believes that the Website Reference and Host Selling Rules are appropriate applications of current polices to address the increasing practice of displaying commercial website addresses during children's programming. The FCC has statutory authority to adopt these rules which do not regulate websites but only the advertising of commercial websites in children's television programming.

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OPPOSITION TO PETITIONS FOR RECONSIDERATION

Children Now, American Psychological Association, American Academy of Pediatrics, Action Coalition for Media Education, American Academy of Child and Adolescent Psychiatry, Benton Foundation, National Institute on the Media and the Family, National PTA, and Office of Communication of the United Church of Christ, Inc. ("Children's Media Policy Coalition" or "Coalition") oppose petitions seeking the rescission or weakening of the Federal Communications Commission's ("FCC" or "Commission") rules adopted in *Report and Order, Children's Television Obligations of Digital Television Broadcasters* ("DTV Order").[1]

I. THE COMMISSION'S REVISION OF THE PROCESSING GUIDELINE PROVIDES A REASONABLE, FLEXIBLE, AND LAWFUL MEANS OF ENSURING THAT BROADCASTERS MEET THEIR PUBLIC INTEREST OBLIGATION TO SERVE CHILDREN

The Commission has appropriately updated the children's programming processing guideline to increase the amount of core programming needed to meet the guideline for those broadcasters who choose to multicast. A multicasting broadcaster that wants to take advantage of the certainty offered by the guideline must provide an additional .5 hour per week of educational and informational ("E/I") programming for every increment of 1 to 28 hours of free

[1] 19 FCC Rcd 22943 (2004) ("*DTV Order*").

video programming it provides in addition to its main program stream.[2] The Coalition agrees with the Commission that this guideline will ensure that broadcasters' offering more total programming will also offer more children's E/I programming. Some Petitioners seek reconsideration arguing that the FCC's decision is 1) unnecessary and unsupported by the evidence; 2) unacceptably inflexible; 3) contrary to statutory authority; and 4) inconsistent with the First Amendment. The Commission should reject these arguments and retain this guideline.

A. The Commission's Decision is Necessary to Ensure that Children Have Access to Adequate E/I Programming.

The National Association of Broadcasters ("NAB") argues that the Commission's rule is unnecessary because there is no evidence demonstrating that commercial television stations have failed to meet Congress' or the FCC's directives as to E/I programming.[3] NAB has already made this argument and the FCC has rejected it.[4] It is well-established that the Commission does not grant petitions for reconsideration "for the purpose of debating matters that have already been fully considered and substantively settled," and bare disagreement "absent new facts and argument . . . is insufficient grounds for reconsideration."[5]

In any event, contrary to NAB's assertions, the record contains substantial evidence that the educational needs of children are not currently being met by the 3-hour guideline. When the Commission adopted the processing guideline in 1996, the Commission settled on 3-hours as a

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[2] *Id.* ¶ 19.
[3] Petition for Reconsideration of NAB, MM Dkt. No. 00-167, filed Feb. 2, 2005 at 4-5 ("NAB Petition").
[4] *DTV Order*, 19 FCC Rcd 22943 ¶ 27. NAB made this argument in their comments and reply comments. Comments of NAB, MM Dkt. No 00-167, filed Dec.18, 2000 at 8-10; Reply Comments of NAB, MM Dkt. No 00-167, filed Jan. 17, 2001 at 2-3 ("NAB Reply Comments"). The Center for Media Education ("CME") rebutted this same argument. Reply Comments of CME, MM Dkt. No. 00-167, filed Jan. 17, 2001 at 12 ("CME Reply Comments").
[5] *Regulatory Policy Regarding the Direct Broadcast Satellite Service*, 94 FCC 2d 741, 747-48 (1983).

reasonable and attainable goal given broadcaster's single program stream.[6] The Commission expected that broadcasters would do more than the bare minimum.[7] Unfortunately, experience has shown that many broadcasters provide only the minimum number of core hours and as a result, significant portions of the child audience are underserved.[8] Now, however, that broadcasters have increased capability, the Commission rightly decided to increase broadcasters' obligations commensurate with that increase.

In addition, there is no reason to believe that multicasting broadcasters will voluntarily air more core programming. While NAB asserts that "absent regulation, broadcasters provided more educational and informational programming than the three-hour guideline,"[9] the history shows that market forces do not ensure that broadcasters serve the E/I needs of children.[10] Thus, without specific programming incentives, broadcasters are unlikely to devote increased capability to serving children. Children, no less than adults, should benefit from the increased capabilities that broadcasters have as a result of being given free use of the public airwaves.

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[6] *Policies and Rules Concerning Children's Television Programming*, 11 FCC Rcd 10660 ¶¶ 121-23 (1996) ("*1996 Order*").
[7] *Id.* ¶ 126.
[8] *See, e.g.*, *Three Year Review of the Implementation of the Children's Television Rules and Guidelines*, 1997-1999 (2001) at 12 ("Three Year Review"). For example, commercial broadcasters have tended to underserve the needs of preschool children and girls of all ages. Similarly, the programs that are offered tend to emphasize socio-emotional themes at the expense of cognitive themes and tend to focus narrowly on elementary school-age children while neglecting other age-groups. *See* Comments of CME, MM Dkt. No. 00-167, filed Dec. 18, 2000 at 7 ("CME Comments").
[9] NAB Petition at 5.
[10] S. REP. NO. 101-227, at 9 (1989) ("Senate Report"); *1996 Order*, 11 FCC Rcd 10660 ¶ 29; Kerkman, Dennis D, et al., *Television Programming and the "Free Market Solution"*, JOURNALISM AND MASS COMMUNICATION QUARTERLY, 147 (1990).

B. The Revised Guideline is Flexible and Reasonably Accommodates Children's Needs with Broadcasters' Desires

NAB and others also argue that the FCC's revised guideline is inflexible and will serve as a disincentive to experimenting with digital technology; these petitioners variously advocate rescinding, modifying or phasing-in the rule.[11] In making their case, some Petitioners pit news programming against E/I programming. For example, they posit a hypothetical broadcaster that wants to air a 24-hour news channel on an additional stream and argue that the guideline effectively forces a choice between three unacceptable options: 1) airing children's programming on the 24-hour news channel where it is inappropriate and children will not watch; 2) displacing its morning news programming on its main channel; or 3) adding a third channel to fulfill its increased core programming obligation.[12] However, rather than establish that the FCC's guideline is unreasonable, these options actually highlight its flexibility.

First, there is no reason why a 24-hour news channel could not include a children's news program. In fact, the legislative history of the Children's Television Act ("CTA") cites a children's news program as an example of the type of programming that it hoped broadcasters would provide to meet the needs of children.[13] The Coalition believes that a 24-hour news channel would be the ideal place to show a children's news program. Any risk that children may not watch a children's news program on a 24-hour news channel could be remedied through promotional efforts.[14]

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[11] NAB Petition at 4-7; Petition for Reconsideration of The Walt Disney Company, MM Dkt. No. 00-167, filed Feb. 2, 2005 at 24-25 ("Disney Petition"); Petition for Reconsideration of Cox Broadcasting, Inc., et al., MM Dkt. No. 00-167, filed Feb. 2, 2005 at 9-13 ("Cox Petition").
[12] NAB Petition at 6; Cox Petition at 9.
[13] *See* Senate Report at 8 (praising "Action News for Kids," a news show produced by and for kids, as an example of a locally produced program that serves the E/I needs of children).
[14] These promotions will not count against a broadcaster's commercial limits. *See infra* at III-C.

Nonetheless, if a broadcaster decides not to offer children's news and instead to air the E/I programming on its main channel, the guideline in no way mandates that children's E/I programming be placed in a morning time-slot. The broadcaster could air children's educational programming during the after school hours, evenings, or at other times on weekends.[15] Finally, if a broadcaster does not want to air E/I programming on its 24-hour news channel or its main channel, then it can air its E/I programming on a channel different than the one that generates the obligation as long as the channels have comparable carriage.[16] Thus, any inflexibility here resides with the broadcasters, not with the Commission's regulations.

The Commission has already rejected the argument that the revised guideline will serve as a disincentive.[17] Rather, the guideline ensures that in the digital television environment, children's E/I programming does not succumb to the market disincentives that have prevented broadcasters from meeting the needs of children in the past. It is important that children's needs are considered part of digital television from the beginning and, in this guideline, the FCC has appropriately balanced children's needs with broadcasters' desires for flexibility.

C. The Commission has Statutory Authority to Adopt the Revised Guideline

NAB suggests that the FCC lacks "clear authority" to adopt additional children's programming obligations because neither the Communications Act nor the CTA mandates

[15] Even if the broadcaster offers less E/I programming, its renewal application would receive staff level review upon a showing that it met the needs of children through its "overall programming." *1996 Order*, 11 FCC Rcd 10660 ¶ 133.
[16] *DTV Order*, 19 FCC Rcd 22943 ¶ 24. To avoid confusion, the Coalition requests that the FCC clarify "comparable carriage" to mean that if the channel creating the obligation is broadcast on satellite and cable, then the channel fulfilling the obligation must also receive satellite and cable distribution.
[17] *Id.* ¶ 27.

additional programming as a result of the transition to digital television.[18] However, both Congress and the Commission have recognized that a broadcaster's public interest obligations continue to apply during and after the transition to digital television.[19] Indeed, Section 336 of the Communications Act, which sets out requirements for the transition to DTV, specifically states that "[n]othing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience and necessity." Further, Section 336(d) requires that in order to obtain renewal of its license, any television licensee that offers ancillary or supplementary services "shall establish that *all of its program services* on the existing or advanced television spectrum are in the public interest."[20]

The CTA directs the FCC to consider the extent to which a licensee seeking renewal "has served the educational and informational needs of children through the licensee's overall programming."[21] This directive applies regardless of whether the station is broadcast using analog or digital technology and "overall programming" surely includes programming on additional streams. In 1996, the FCC decided that this goal was best promoted by quantifying a broadcaster's E/I programming obligation.[22] NAB agreed that the 1996 action was "consistent with Congress' intent in the Act," and it also agrees broadcasters have a continuing duty to serve the public interest.[23] Because the FCC's action in the current regulation is no different than that

[18] NAB Petition at 9-10 & n. 19.
[19] 47 U.S.C. § 336(d); S. REP. NO. 104-230, at 8 (1995) ("The bill permits broadcasters to use their spectrum for new services so long as they continue to provide broadcast programming that meets their public interest obligation."); *Fifth Report and Order, Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12811 (1997); *Children's Television Obligations of Digital Television Broadcasters, Notice of Proposed Rulemaking*, 15 FCC Rcd 22946 ¶ 11 (2000) ("NPRM").
[20] 47 U.S.C. § 336(d) (emphasis added).
[21] *Id.* § 303b(a)(2).
[22] *See 1996 Order,* 11 FCC Rcd 10660 ¶ 129.
[23] *Id.* ¶ 118 (citing NAB Supplemental Comments); NAB Petition at 9.

taken in 1996 to quantify broadcasters' E/I programming requirements, it is not clear why NAB takes issue with the Commission's statutory authority in this context. In fact, now that broadcasters are capable of offering more programming services, it would be counter to the CTA's intent to increase the amount of children's educational programming for the FCC to permit broadcasters that multicast to satisfy their public interest obligations to children with a mere three hours of E/I programming.

D. The Revised Guideline is Consistent with the First Amendment

NAB argues that the revised guideline violates the First Amendment because it requires broadcasters to air specified types of programming.[24] NAB, however, ignores well-established law that the government is justified in regulating the use of scarce broadcast frequencies to ensure that broadcast licensees serve the public interest by, *inter alia*, providing programming serving the E/I needs of children.[25] In adopting the 3-hour guideline in 1996, the Commission engaged in a lengthy constitutional analysis and concluded the guideline was constitutional.[26] No court has ever found otherwise. NAB's constitutional objection is an attempt to reopen matters settled in 1996.[27] NAB offers no reason to reach a different conclusion regarding the revised guideline. Because, like the prior guideline, the updated guideline is a reasonable means of assessing whether broadcasters are meeting their public interest obligations to children, it is consistent with the First Amendment.

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[24] NAB Petition at 10-12.
[25] S*ee* Senate Report at 10-11; *1996 Order,* 11 FCC Rcd 10660 at 10728-33; CME Reply Comments at 15-17.
[26] *1996 Order,* 11 FCC Rcd 10660 ¶¶ 146-159.
[27] NAB Petition at 12 (stating "[g]iven the dubious constitutionality of even the original guideline").

II. THE COMMISSION SHOULD REJECT CALLS TO RESCIND OR MODIFY THE 10 PERCENT LIMIT ON PREEMPTIONS

When adopting the processing guideline in 1996, the FCC required that, for an E/I program to count as "core," it must be "regularly scheduled," that is, "scheduled to air at least once a week" and "air on a regular basis."[28] The FCC stated it would leave it to the staff, with guidance from the full Commission as necessary, to determine what counts as "regularly scheduled" programming and what level of preemption is allowable. After several years of experience, the FCC has now appropriately decided to limit the number of times an analog or digital broadcaster can preempt a program and still have that program count as "regularly scheduled" to "no more than 10 percent of core programs in each calendar quarter."[29] A licensee that has excessive preemptions may still receive staff level approval by demonstrating "a commitment to educating and informing children at least equivalent to airing the amount of core programming indicated by the processing guideline."[30]

Some Petitioners request that the FCC modify the preemption limit to better accommodate major sporting events such as the Olympics and World Cup.[31] The Coalition agrees that a modest modification is appropriate. Thus, the Coalition supports Univision Communications Inc.'s proposal to allow preemptions to be calculated on an annual, rather than 6-month, basis.[32] This will provide broadcasters with up to 6 preemptions per year, and allow

[28] *DTV Order*, 19 FCC Rcd 22943 ¶ 105.
[29] *Id*. ¶ 41.
[30] *Id*. ¶ 42. And, even if a broadcaster fails to demonstrate this commitment, it can demonstrate to the full Commission that it complied with the CTA through other means. *1996 Order*, 11 FCC Rcd 10660 ¶¶ 131-139.
[31] *See e.g.*, Petition for Reconsideration of Univision Communications Inc., MM Dkt. No. 00-167, filed Feb. 2, 2005 at 11.
[32] *Id*. at 12.

uninterrupted coverage of major sporting events while still allowing the scheduling predictability needed to locate core programs.[33]

A. The Commission Gave Adequate Notice that It Might Adopt a Limit on Preemptions

Joint petitioners Fox, NBC, and Viacom ("the Networks") argue that the Commission failed to give adequate notice that the new rule might apply to analog broadcasters.[34] This argument misconstrues the obligations of an agency in issuing adequate notice.

Under the Administrative Procedure Act ("APA"), an agency must notify the public of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[35] The test is whether the notice "would fairly apprise interested persons of the subjects and issues [it] was considering"[36] so that those parties are able to participate in the rulemaking process, and "comments raising a foreseeable possibility of agency action can be a factor in providing notice."[37] Furthermore, the exact result reached in a rulemaking does not have to be set out in the initial notice for it to be sufficient if the final rule was the "logical outgrowth" of the proposed rule.[38]

Under this standard, the FCC gave adequate notice. The Notice of Proposed Rulemaking ("NPRM") specifically asks how it might modify its preemption policy, including the suggestion

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[33] In fact, having preemptions concentrated around such a highly visible event with few or no preemptions the rest of the year will likely make it easier for parents and children to locate core programming than a program that is preempted randomly over a 6 month period.
[34] Petition for Reconsideration of Fox Entertainment Group Inc., NBC Universal, and Viacom, MM Dkt. No. 00-167, filed Feb. 2, 2005 at 22-23 ("The Networks Petition").
[35] 5 U.S.C. § 553(b)(3).
[36] *American Transfer & Storage Co. v. ICC*, 719 F.2d 1283, 1303 (5th Cir. 1983).
[37] *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991) (citing *Natural Resources Defense Council v. Thomas*, 838 F.2d 1224, 1243 (D.C. Cir. 1988)).
[38] *Sprint Corp. v. FCC*, 315 F.3d 369, 375 (D.C. Cir 2003) (quoting *City of Stoughton v. EPA*, 858 F.3d 747, 751 (D.C. Cir. 1988)); *Small Refiner Lead Phase-Down Task-Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

of a rule specifying "the number of times a core program could be preempted and still count toward the three-hour-per-week processing guideline."[39] While this paragraph does not explicitly state that such a rule would apply to both analog and digital broadcasters, the NPRM states at the outset that "[a]lthough we seek comment largely on challenges unique to the digital area, we also explore several issues that children's advocates have raised about children's educational and informational programming more generally."[40] And, in the footnote to the quoted sentence, the FCC adds that it particularly wants input on issues arising in the analog context with respect to: "section E entitled 'Other Steps to Improve Educational Programming.'"[41] In Section E, the FCC "invite[d] commenters to address what steps the FCC might take to increase public awareness of the availability of core programs and how to locate it."[42] This language fairly apprised interested parties of the subjects and issues the FCC was considering.

In fact, in response to the NPRM, The Center for Media Education ("CME") specifically urged that preemption limits apply to both digital and analog broadcasters in order to increase the ability of core programming to attract and retain an audience.[43] These comments demonstrate the foreseeability of the FCC's action. Furthermore, the Networks had ample opportunity to respond to the specific proposal to apply the preemption limits to analog broadcasters by filing reply comments, *ex parte* letters, or comments in the *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, which sought to

[39] NPRM, 15 FCC Rcd 22946 ¶ 28.
[40] *Id*. ¶ 1.
[41] *Id*. n.1.
[42] *Id*. ¶ 38.
[43] CME Comments at 16-17. While the Networks chose not to issue reply comments, NAB specifically addressed CME's proposal. NAB Reply Comments at 8-10.

update the record in the Children's DTV proceeding.[44] Finally the rule the Commission adopted is a "logical outgrowth" of the options presented in the NPRM. In light of the problems the Commission found regarding station preemption practices, it would not make sense to adopt a preemption limit that applied only to digital television.

B. The Commission's Decision is Supported by Evidence and Affords Broadcasters Sufficient Flexibility

Petitioners argue inconsistently that there is no need to limit preemptions while at the same time asserting that imposing a 10% limit will have "devastating effects" on broadcasters.[45]

In the NPRM, the Commission described efforts of the Mass Media Bureau ("MMB") to monitor preemptions during the first three years the guideline was in effect. Based on these efforts, the Commission expressed concern that the average preemption rate by stations affiliated with the three largest networks had been nearly 10%, and as high as 25% during quarters when those networks have a large number of sports programming commitments.[46] Subsequent to issuance of the NRPM, the MMB issued a report looking at broadcasters' performance during

[44] 18 FCC Rcd 1279, 1319-20 (2003).
[45] *See, e.g.*, Disney Petition at 14-15.
[46] NPRM, 15 FCC Rcd 22946 ¶ 28. Although the MMB allowed for liberal preemptions for ABC, NBC, and CBS owned and operated stations in the 1997-1998 season, it did so because this season was the first under the processing guidelines and it "believe[d] that it [was] appropriate to allow the Commission and the local stations to gain experience with regard to the scheduling of children's core programming." *See, e.g.*, Letter from Roy J. Stewart, Chief, Mass Media Bureau to: Rick Cotton and Diane Zipursky, NBC, Inc. (July 11, 1997). By the 1998-1999 season, when NBC requested a continuation of this preemption flexibility, the Commission was already expressing its "concern with what appears to be a relatively high average preemption rate experienced by NBC's owned and operated stations. . . [which] experienced a relatively high average preemption rate of 10.7%." *See* Letter from Roy J. Stewart, Chief, Mass Media Bureau to: Diane Zipursky, NBC, Inc. (Oct. 28, 1998).

the first three years the guideline was in effect, which found that, on average, CBS, ABC, and NBC were each preempting nearly 10% of their E/I programming.[47]

The MMB's review, along with the prior MMB analyses of the preemption practices of stations owned and operated by the networks, provides ample evidence that some television stations have excessively pre-empted children's educational programming. Further evidence can be found in the Petitions for Reconsideration. For example, Disney admits that it routinely preempts its E/I programming more than 10% of the time when it claims that "[t]here is no reasonable way ABC can continue to comply with its current sports contracts and with the 10% Rule and still air its E/I children's programming on Saturday mornings."[48] Thus, there is simply no basis for Petitioners' claim that the record lacks evidence supporting its decision to adopt a limit on preemptions rather than relying on case-by-case analysis by the staff.

At the same time, the Commission should reject Disney's complaint that the 10% limit fails to afford sufficient flexibility. As with the updated guideline generally, see supra at I-B, any problem with flexibility lies with the broadcasters, not the FCC's rules. Nothing in the guidelines or 10% preemption limit requires broadcasters to air children's E/I programming exclusively on Saturday mornings. In fact, under the guideline, E/I programming can be aired anytime between the hours of 7:00 am and 10:00 pm and on any day of the week.[49] Thus, the guideline is both flexible and consistent with the long standing goal of both the FCC and Congress to encourage broadcasters to air children's programming throughout the week and at

[47] Three Year Review at 1-2. This review was conducted so that the Commission could "take appropriate action as necessary to ensure that the stations are complying with the rules and guidelines." *Id.*
[48] Disney Petition at 14.
[49] *1996 Order,* 11 FCC Rcd 10660 ¶ 99; 47 C.F.R. § 73.671(c)(2).

different times of the day.[50] In fact, more children watch TV during the week than on Saturday morning and broadcasters should do more to offer children's E/I programming on weekdays.[51]

In sum, the FCC both gave sufficient notice and had an adequate record for adopting the 10% limit on preemptions. The 10% limit already affords great broadcast flexibility, and calculating preemptions on an annual basis would provide even greater flexibility.[52]

III. THE COMMISSION SHOULD REJECT ARGUMENTS TO RESCIND ITS REVISED DEFINITION OF COMMERCIAL MATTER

To maximize the amount of program content and reduce the interruptions in children's programs, the FCC revised its "definition of 'commercial matter' to include promotions of television programs or video programming services"[53] Further, to improve awareness of E/I programming, the FCC exempted E/I program promotions.[54] Petitioners variously argue that the Commission should rescind this revised definition because it 1) exceeds the Commission's statutory authority; 2) was adopted without adequate notice; 3) lacks support in the record and will have an adverse economic impact on the industry; and 4) is contrary to the First Amendment. The Commission should reject these arguments and maintain its new definition of commercial matter.

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[50] *Children's Television Report and Policy Statement,* 50 FCC 2d 1, ¶¶ 26-27 (1974) *aff'd., Action for Children's Television v. FCC,* 564 F.2d 458 (D.C. Cir. 1977) ("*1974 Policy Statement*"); *1996 Order,* 11 FCC Rcd 10660 ¶ 15; Senate Report at 8.

[51] *See* NIELSEN MEDIA RESEARCH, *2000 Report on Television*, (2000) at 14; *See also* Petition for Reconsideration of 4Kids Entertainment, Inc., MM Dkt. No. 00-167, filed Feb. 2, 2005 at Exhibit C (showing that the best rated programs among children ages 6-14 occur in the afternoon or evening of both weekdays and weekends).

[52] And, as digital technology becomes more widespread, the Commission's guideline provides a "safety-valve" for broadcasters who relocate their core programming to another stream that receives comparable carriage.

[53] *DTV Order,* 19 FCC Rcd 22943 ¶¶ 56, 57.

[54] *Id.* ¶ 57.

A. The Commission has Authority to Define Commercial Matter to Include Promotions for Non-E/I Programs.

Contrary to some Petitioner's arguments, the FCC possesses clear authority to modify this definition.[55] Although the CTA itself does not define commercial matter, §303(c) explicitly authorizes the FCC to "review and evaluate the advertising duration limitations" and "after notice and public comment and a demonstration of the need for modification of such limitations, *modify such limitations in accordance with the public interest*."[56] The FCC can modify the limitations directly by changing the numerical limits, for example by reducing the weekday limit from 12 minutes to 10 minutes, or by changing the definition of commercial matter to be more inclusive. Here, the Commission has chosen to modify the advertising limits by altering the definition of commercial matter.

Petitioners point to language in the Senate Report stating that "[t]he Committee intends that the definition of 'commercial matter' . . . will be consistent with the definition used by the FCC in its former FCC Form 303."[57] However, the FCC correctly found that the revised definition is consistent with the definition used in former FCC Form 303.[58] Form 303 specifically categorized "promotional announcements of a future program where consideration [is] received" as commercial matter.[59] When a station airs promotions for its own programs, it is clearly receiving consideration in the form of increased audiences.[60] Indeed, Petitioners

[55] *See e.g.*, Petition for Reconsideration of Nickelodeon, MM Dkt. No. 00-167, filed Feb. 2, 2005 at 6-9 ("Nickelodeon Petition"); Petition for Reconsideration of The WB Television Network, MM Dkt. No. 00-167, filed Feb. 2, 2005 at 5 ("WB Petition").
[56] 47 U.S.C. §303a(c) (emphasis added).
[57] *See, e.g.*, Nickelodeon Petition at 7-8 (quoting Senate Report at 21).
[58] *DTV Order*, 19 FCC Rcd 22943 ¶¶ 58, 59.
[59] Senate Report at 21 (quoting Form 303(c)).
[60] *DTV Order*, 19 FCC Rcd 22943 ¶58.

effectively concede that they receive consideration for airing promotions of their own programming when they argue that changing the definition will adversely affect their revenues.[61]

Even if the FCC's revised definition was inconsistent with the former Form 303, that would not prevent the FCC from changing the definition. Although Congress clearly intended the FCC to use Form 303 definition as a starting point, nothing in the CTA or its legislative history expresses Congress' intent to prohibit the FCC from changing the definition in the future if circumstances have changed such that a change would serve the public interest. As the courts have found, "[t]o freeze an agency interpretation, Congress must give a strong affirmative indication that it wishes the present interpretation to remain in place."[62] Because here Congress gave no such indication, and if anything, indicated the FCC should periodically review and modify advertising limits in the public interest, the Commission clearly has authority.

B. The Commission Gave Adequate Notice of Its Intent to Revise the Definition of Commercial Matter

Nickelodeon suggests that the Commission did not give adequate notice that the revised definition of commercial matter would distinguish between E/I and non-E/I program promotions.[63] As discussed above, the APA requires that an agency provide "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[64] Notice is adequate if it apprises the interested persons as to the subject and issues the agency is

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[61] WB Petition at 9; Petition for Reconsideration for Turner Broadcasting System, Inc., MM Dkt. No. 00-167, filed Feb. 2, 2005 at 13 ("Turner Petition"). Additionally, some Petitioners treat program promotions on their websites as advertisement. For example, a banner for Batman's "CobbleBot Caper" game promoting new Batman shows on The Cartoon Network is clearly labeled as an advertisement. http://www/cartoonnetwork.com/tv_shows/thebatman/index.html (last visited March 22, 2005).

[62] *AFL-CIO v. Brock*, 835 F.2d 912, 916 (DC Cir. 1987); *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620, 13721-13725 (2003) (explaining that the Telecommunications Act of 1996 did not restrict how the FCC could define local radio markets).

[63] Nickelodeon Petition at 14.

[64] 5 U.S.C. § 553(b)(3).

considering, comments are relevant evidence establishing the adequacy of notice, and the final rule need only be a "logical outgrowth" of the proposal.[65]

Here, the NPRM explicitly invited comment on "whether the Commission should revise its definition of 'commercial matter' to include *some or all* of these types of program interruptions that do not currently contribute toward the commercial limits."[66] The Commission specifically referred to "promotions of upcoming programs that do not contain sponsor-related messages, public service messages promoting not-for-profit activities, and air-time sold for purposes of presenting educational and informational material" as the types of program interruptions it was considering.[67] The NPRM also asked a series of questions about whether and how stations were promoting core programming and asked "commenters to address what steps the FCC might take to increase public awareness of the availability of core programming and how to locate it."[68] Included in the options for comments was "[s]hould the FCC require that broadcasters promote core programs?"[69] In response, CME proposed that the definition include non-E/I program promotions as "commercial matter," but exclude E/I promotions to provide an incentive for airing E/I promotions.[70] Thus, the FCC gave adequate notice, and Petitioners had ample opportunity to comment on this specific aspect of the definition of commercial matter.

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[65] *See supra* II-A.
[66] NPRM, 15 FCC Rcd 22946 ¶ 34 (emphasis added).
[67] *Id.* ¶ 33.
[68] *Id.* ¶ 38.
[69] *Id.*
[70] *See* CME Comments at 42-44.

C. The Commission's Decision is Reasonable and Supported by Evidence

Petitioners argue that the revised definition is unreasonable because there is no evidence that excessive promotions are a problem[71] or that the changed definition will achieve the FCC's goal of avoiding interruptions and increasing the length of children's programming.[72] However, the FCC has ample basis to conclude that the new definition will benefit children while not unduly burdening broadcasters or cable operators.

First, as the FCC observed in the NRPM, "there is a significant amount of time devoted to [promotions of upcoming programs and other announcements] in children's programming. As a result, the amount of time devoted to actual program material is often far less than the limitation on the duration of commercial matter alone might suggest."[73] Moreover, both the broadcast and cable industries have increased the non-program content or "clutter" that appears during programming. Since 1984, non-program content has increased 36% so that, in 2003, nearly one of every three hours of prime-time programming was non-program content.[74]

This trend toward more non-program content is visible in the context of children's programming. For example, in 1989, Nickelodeon reported running "only 8 minutes of commercial time per hour because we feel this offers an uncluttered environment to our viewers and our advertisers . . . [and] we only run four minutes of advertising when we run preschool programming. . . because we think it is better for kids and . . . we predict that the marketplace

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[71] *E.g.*, Turner Petition at 9-10.
[72] *Id*.
[73] NPRM, 15 FCC Rcd 22946 ¶ 33.
[74] *See, e.g.*, Steve McClellan, *Ad Clutter Keeps Climbing; Prime time on broadcast nets has seen a 36% increase in a decade*, BROADCASTING AND CABLE, Dec. 22, 2003 at 13. Only Discovery Channel has decreased its clutter. Jon Lafayette, *Clutter on Broadcast Rises; Three of Big 4 Nets Surpass 15 Minutes Per Hour of Nonprogram Material*, TELEVISION WEEK, Apr. 12, 2004 at 3.

will continue to learn what is good for kids is good for business."[75] Nickelodeon no longer follows this practice and, in fact, was fined in 2004 for exceeding the commercial limits.[76]

The WB Television Network ("WB") provides dramatic evidence of the extent to which children are being short changed by the excessive amount of promotions. WB reports that of its 14 hours per week of children's programming, at least one hour is devoted to program promotions. WB also reports broadcasting the maximum amount of advertising time permitted under the FCC rules.[77] Thus, more than 25% of WB's children's programming consists of non-E/I promotions and commercials.[78] It is clear then, that the evidence supports changing the definition of commercial matter to include program promotions.

As to Petitioners' assertion that the revised definition "will not necessarily lead to an increase in program material" because the length of library programs are predetermined,[79] there are at least three ways the revised definition can help increase program content. First, a broadcaster or cable network can directly increase the length of the program by inserting program material into library material.[80] Second, library materials may be supplemented with

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[75] *Time Limits for Children's Programs on Cable TV: Hearing on S.1992 Before the Senate Comm. on Commerce, Sci., and Transp., Subcomm. on Communications*, 101st Cong. 14 (1989).
[76] *Viacom International Inc., Coxcom Inc., Operator of a Cable Television System in San Diego, Cal.*, 19 FCC Rcd 20,802 (2004). Viacom has also decided to change the status of "Nicktoons" from a commercial-free network and website to a network and website that will now be ad-supported. *Nicktoons Going Ad-Supported in August*, MUTLICHANNEL NEWS, March 9, 2005.
[77] WB Petition at 10.
[78] Included in WB's 840 minutes (14 hours x 60 minutes per hour) per week of programming are 62 minutes of non-program content on Saturdays (20 minutes of promotions + 42 minutes of commercials (4 hours x 10.5 minutes per hour maximum)) and 160 minutes of non-program content on weekdays (40 minutes of promotions + 120 minutes of commercials (10 hours x 12 minutes per hour maximum)). This means *at least* 222 minutes of every 840 minutes – 26.4 % – consists of non-program content. *Id*. at 10.
[79] *Id*. at 12.
[80] For example, DIC Entertainment Group has added inserts claimed to be educational to programs produced by the BBC in an attempt to qualify them as E/I. *Submission of DIC Entertainment Corp. in Support of Opposition of Fox Television to United Church of Christ and*

short form programs, such as "School House Rock," or news bulletins for kids. Finally, because any new program would be longer, over time, stations and cable networks would build up a library of longer programs. Thus, revising the definition of commercial matter should increase the amount of program content for children over both the short and long run.

Finally, the Commission should reject Petitioners' claims that the revised definition leaves them with a "Hobson's choice" of whether to sell fewer ads or air fewer promotions, both of which lead to a decrease in revenue.[81] No Petitioner provides any concrete evidence or even estimates about the effect of this changed definition on revenues. And, while some may decide to sell less advertising to continue promoting their show at the same level, the reduction in time sold will not necessarily lead to a reduction in revenue. In 1974, the FCC found that there was an "inelasticity of demand" for advertising on children's programs and therefore, "the level of advertising on children's programs can be reduced substantially without significantly affecting revenues because the price for the remaining time tends to increase."[82] Petitioners present no evidence showing that this has changed. If anything, demand for children's advertising time is much higher now than thirty years ago.[83] In addition, as the American Advertising Federation

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Center for Digital Democracy Petition to Deny, Declaration of Donald F Roberts, *Application for Renewal of Broadcast Station License of Fox Television Stations, Inc., WDCA, Washington, D.C.,* File No. BRCT-20040527AKL ¶¶ 13-14 (2004).

[81] *E.g.*, WB Petition at 11. Fox argues that this definition also undermines the ability of E/I programs to attract and retain an audience by making it impossible to promote blocks of E/I and non-E/I programs. Petition for Reconsideration of Fox Entertainment Group, Inc., MM Dkt. No. 00-167, filed Feb.2, 2005 at 4-7 ("Fox Petition"). Fox seems to believe that the only way to make children's E/I programming entertaining and attractive is to mix it in with non-E/I programming. However, the Commission expects E/I programming to be entertaining in its own right. We also believe that the biggest obstacle to the success of the CTA and E/I programming is the inability of the audience (parents and children) to locate E/I programming.

[82] *1974 Policy Statement,* 50 FCC 2d 1 ¶ 40.

[83] For example, WB argues that it is unable to redistribute the 60 minutes per week of non-E/I promotions that it would normally air during children's programs because all of its advertising on its children's programs is sold out. WB Petition at 10. *See also, e.g.*, JAMES U. MCNEAL,

notes, the more clutter there is in a program, the less valuable the advertising is.[84] Thus, selling fewer ads should not necessarily entail a loss in revenue.[85]

Moreover, it is simply not true that a broadcaster must promote its shows less often. For example, a broadcaster can promote an E/I program as often as it likes and it will not count as "commercial matter."[86] Broadcasters and cable networks are also free to promote children's programs during programming not specifically designed for children but that are watched by significant numbers of children.

Finally, broadcasters complaining about the economic impact of the Commission's decision misunderstand the nature of their obligation to serve the public. In 1974, the Commission observed, "[i]n the final analysis, the medium of television cannot live up to its potential in serving America's children unless individual broadcasters . . . put profit in second place and the children in first."[87] Thus, even if this decision may result in some revenue loss, protecting children from excessive advertising is part of a broadcaster's public interest obligation.

D. The Commission's Definition is Consistent with the First Amendment

Some Petitioners suggest that the Commission's decision to distinguish between promotions for E/I programs and for non-E/I programs raises questions under the First

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KIDS AS CUSTOMERS: A HANDBOOK OF MARKETING TO CHILDREN (1992); CME Comments at 24 (explaining that television advertising directed at children as of 1999 exceeded 800 million a year; the total amount spent marketing and advertising was then around 500 billion).

[84] Petition for Reconsideration for American Advertising Federation et al., MM Dkt No. 00-167, filed Feb. 2, 2005 at 5-6 ("AAF Petition").

[85] Although cable networks devoted to children's programming claim a particular hardship, the cable networks receive revenue from two sources, advertising and subscriptions.

[86] Although cable networks are not obligated to air E/I programs, some do, and they would not have to count promotions for these programs as commercial matter.

[87] *1974 Policy Statement*, 50 FCC 2d 1 ¶ 59.

Amendment.[88] If the modified definition is challenged in court, it would be analyzed under the test set forth in *Central Hudson*.[89] Under *Central Hudson*, a regulation of lawful commercial speech that is not misleading complies with the requirements of the First Amendment if the restriction 1) involves a substantial governmental interest; 2) directly advances that interest; and 3) is no more extensive than necessary.[90]

Here, protecting children from over commercialization and increasing the amount of E/I programming available to children are substantial governmental interests. This has been repeatedly recognized by the Congress, the Commission, and the courts.[91] Second, as discussed above, the revised definition of commercial matter directly advances the goal of limiting excessive commercial matter. It also advances the interests in increasing program content for children, as well as making it easier for parents and children to find E/I programming. Finally, the Commission's definition is narrowly tailored to meet these goals. It allows ample time for ads and promotions during children's programming as well as permitting such commercial material at other times. Petitioners do not argue that the Commission cannot regulate all promotions, but suggest somehow that the distinction between E/I and non-E/I promotions somehow takes a constitutional regulation and makes it unconstitutional.[92] To the contrary, the exception for promotions for E/I programming aired during children's programming reflects a careful weighing of the costs and benefits of such promotions and, if anything, demonstrates how

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[88] *See e.g.*, Nickelodeon Petition at 10.
[89] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 558, 566 (1980) ("*Central Hudson*"). AAF argues that the Commission's decision should be reviewed under strict scrutiny. However, *Lorillard Tobacco Co v. Reilly*, 533 U.S. 525, 555 (2001) affirmed that *Central Hudson* applies to commercial speech. AAF Petition at 10-11.
[90] *Central Hudson*, 447 U.S. at 566.
[91] *See e.g.*, Senate Report at 5 ("[o]ur children are this nation's most valuable resource, and we need to pay special attention to their needs."); *1996 Order*, 11 FCC Rcd 10660 ¶ 7 (noting children are a *compelling* interest); *Ginsberg v. New York*, 390 U.S. 629, 636-41 (1968).
[92] *See, e.g.*, AAF Petition at 10-11.

the FCC has carefully tailored this regulation.[93] Thus, the revised definition of commercial matter raises no problems under the First Amendment.

IV. THE COMMISSION SHOULD REJECT ARGUMENTS TO RECSIND ITS WEBSITE DISPLAY RULES

The DTV Order applies the Commission's policies requiring the clear separation of programming and commercial content and limiting host selling to the display of websites during children's programs .[94] First, under the "Website Reference Rule," the Commission will count the display of a website address in a children's program toward the commercial time limit unless the website is predominantly non-commercial in nature as determined by the application of a four-part test.[95] Second, the Commission has interpreted its policy against host selling to prohibit the display of website addresses for sites which use characters from the program to sell products or services ("Host Selling Rule").[96]

Contrary to the claims of some Petitioners, the FCC complied with the notice requirements of the APA.[97] Moreover, the FCC has statutory authority to adopt these rules. Section 303a(b) directs the Commission to "limit the duration of advertising in children's

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[93] *Cf. Lorillard Tobacco Co*, 533 U.S. at 561-66 (2001) (stressing the importance of balancing the benefits and harms in assessing the constitutionality of a regulation).

[94] The FCC has also issued a Further Notice of Proposed Rule Making to determine how to address interactive links in children's programming. *DTV Order*, 19 FCC Rcd 22943 ¶ 71. The Coalition plans to file comments supporting limits on interactivity.

[95] *DTV Order*, 19 FCC Rcd 22943 ¶ 50. AAF argues that the restriction apply to only the visual and not the aural display of websites. AAF Petition at 20. However, the Coalition sees no distinction. It is not how the websites are displayed, but that they are displayed that matters. AAF recognized this when, in a footnote, it argues that if aural displays are allowed, then the Commission has no reason to ban visual displays. AAF Petition at 12 n. 20.

[96] *DTV Order*, 19 FCC Rcd 22943 ¶ 51.

[97] Under the APA standard discussed *supra* II-A, the NPRM gave adequate notice because it sought comment on whether the Commission should "prohibit all direct links to commercial websites during children's programming." NPRM, 15 FCC Rcd 22946 ¶ 32. As noted by WB, "websites links" can refer to either a passive display or an interactive link. Reply Comments of the WB Television Network, MM Dkt. 00-167, filed Jan. 17, 2001 at 6 n. 6.

television programming."[98] The Website Reference and Host Selling Rules do not regulate websites but only the advertising of commercial websites in children's television programming. A broadcaster need not make any changes to their websites to comply with the rules; it only needs to ensure a website address displayed during a children's program meets the four-part test and is free of host selling.

The Coalition believes that these rules are a necessary application of current polices to address the increasing practice of displaying commercial websites during children's programming – especially in light of recent research showing that children frequently visit websites advertised on television while watching television.[99] In 1974, the FCC adopted the policy that broadcasters should "maintain an adequate separation between programming and advertising on programs designed for children" because "many children do not have the sophistication or experience needed to understand that advertising is not just another form of informational programming."[100] Because children have difficulty distinguishing between advertising and programming, commercial website addresses like conventional television commercials, present the same problem.[101]

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[98] 47 U.S.C. § 303a(b). Because the statute provides the Commission with a specific grant of authority therefore, AAF's reliance on *MPAA v. FCC*, 309 F.2d 797 (D.C. Cir. 2002) is misplaced. AAF Petition at 16.

[99] In fact, the recent Kaiser Study found that "one in four (28%) youth say they 'often' (10%) or 'sometimes' (18%) go online while watching television to do something related to the show they're watching." Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds, Executive Summary* at 7 (2005).

[100] *1974 Policy Statement*, 50 FCC 2d 1 ¶ 47.

[101] CME Comments at 32. One study indicated "74% of the children sampled in one survey believed that the purpose of the commercial [website] was to entertain." Lucy L. Henke, *Children, Adverting, and the Internet: An Exploratory Study, in advertising and the World Wide Web* 73, 78-79 (David W. Schumann & Esther Thorsen eds., 1999).

Because children place trust in program characters, the Commission has broadly applied its prohibition on host-selling.[102] The Host-Selling Rule will prevent television advertisers from taking unfair advantage of children by directing them to websites where host selling occurs.[103]

It is important to maintain these rules because there are clear examples of problems with host selling on websites. For example, Nickelodeon's homepage currently features an advertisement for Virgin mobile phones that includes "SpongeBob SquarePants" promoting the wireless phone service.[104] While some Petitioners are concerned that the Web Reference and Host Selling Rules are unclear or difficult to apply,[105] the Coalition believes the FCC can successfully address these concerns on a case-by-case basis, as is common practice.

[102] *1974 Policy Statement*, 50 FCC 2d 1 ¶ 52; *See, e.g. Dr. Fredrick Brientenfeld, Jr. President, WHYY, Inc*., 7 FCC Rcd 7123 (1992).

[103] Congress has consistently recognized that children need to be protected from certain types of advertising. *See The Telephone Disclosure Dispute Resolution Act,* 15 U.S.C. § 5701. For example, because of children's inability to recognize the implications of dialing a 1-900 number, Congress directed the FTC to adopt rules prohibiting the advertisement of such services, except "bona fide education services," to children under the age of 12. 15 U.S.C. § 5711 (a)(1)(D); S. REP. NO. 102-90, at 14 (1991)

[104] This advertisement was obtained on the www.nickelodeon.com website on March 22, 2005.

[105] *E.g.*, AAF Petition at 14. Petitioners question what these terms in the rule mean; "substantial amount," bona fide," "program-related," "noncommercial," "primarily," and for "commercial purposes."

CONCLUSION

As outlined above, the Commission should reject Petitioners arguments to rollback or water down the children's television obligations of digital television broadcasters and should implement the new rules in a timely manner.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Opposition filed by the Children's Media Policy Coalition, through their attorneys, the Institute for Public Representation, have been served by first-class mail, this 23rd of March, 2005, on the following persons at the addresses shown below.

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